

Docket Nos. 2005-402-C, 2005-403-C, 2005-404-C, 2005-405-C, and 2005-406-C
Order No. 2006-

In re: Docket No. 2005-404-C

Time Warner Cable Information
Services (South Carolina), LLC,

Complainant/Petitioner,

vs.

Home Telephone Co., Inc.,

Defendant/Respondent.

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In re: Docket No. 2005-405-C

Time Warner Cable Information
Services (South Carolina), LLC,

Complainant/ Petitioner,

vs.

PBT Telecom, Inc.,

Defendant/Respondent.

In re: Docket No. 2005-406-C

Time Warner Cable Information
Services (South Carolina), LLC,

Complainant/ Petitioner,

vs.

Ft. Mill Telephone Company,

Defendant/Respondent.

This matter comes before the Public Service Commission of South Carolina (“Commission”) upon a motion by Time Warner Cable Information Services (South Carolina), LLC (“TWCIS”) for summary disposition of the complaints filed by TWCIS and a joint motion to dismiss or, in the alternative, hold proceedings in abeyance by St. Stephen Telephone Co.; Farmers Telephone Cooperative, Inc.; Home Telephone Company, Inc.; PBT Telecom, Inc.; and Fort Mill Telephone Co. Because of the reasons stated below, TWCIS motion for summary

disposition is granted and the Commission's prior ruling that TWCIS is entitled to negotiate an interconnection arrangement with the ILECs is affirmed.

BACKGROUND

TWCIS was granted a certificate of public convenience and necessity to provide service in certain areas of South Carolina in *Order No. 2004-213*, Docket No. 2003-362-C, May 24, 2004. In October 2004, TWCIS returned to the Commission requesting permission to provide service in certain areas carved out from its initial authorization including the ILECs' service areas. TWCIS simultaneously filed a separate application requesting permission to provide service in ALLTEL's service area. In these two subsequent dockets, TWCIS requested that it be authorized to provide the same kind of competitive voice service as TWCIS currently is authorized to provide under the first certification *Order*. The *Order* in the ILECs' docket provided

The application of TWCIS originally sought an expanded Certificate of Public Convenience and Necessity to serve the service areas of the denominated rural local exchange carriers (the ILECs). At the hearing, TWCIS stated its desire to possess the expanded certificate so that it could enter into interconnection agreements with the rural LECs, and then serve a non-regulated Time-Warner subsidiary as a wholesale. No expansion of the Company's Certificate is needed for it to enter into negotiations with the RLECs. The *Company possesses this ability as a telecommunications carrier* under Section 251 of the Telecommunications Act of 1996 and no further blessing of this Commission is needed for this undertaking.

Order No. 2005-412, p. 6, ¶ 1 (emphasis added).

On July 29, 2005, TWCIS submitted a bona fide request for interconnection to each of the ILECs pursuant to Sections 251(a), (b), and (c) and 252 of the Federal Act. TWCIS' Motion Exhibit 1. On October 19, 2005, counsel for Home, PBT, and Fort Mill responded indicating

that Home, PBT, and Fort Mill “will negotiate with TWCIS pursuant to the applicable state and federal rules and regulations. As such, Home, PBT, and Fort Mill have engaged Lans Chase of the consulting firm John Staurulakis, Inc. (“JSI”) to negotiate with TWCIS on behalf of Home PBT, and Fort Mill. Mr. Chase is in the process of preparing a proposed agreement and will send it to you for your review and consideration.” TWCIS’ Motion Exhibit 2.

TWCIS subsequently sent a letter to the ILECs’ counsel on December 14, 2005, requesting notification as to whether the ILECs intended to move forward with negotiations. TWCIS’ Motion Exhibit 3. By letter dated December 16, 2005, the ILECs refused to negotiate an interconnection agreement in their service areas “because TWCIS does not appear to be a telecommunications carrier in the areas of the state served by the RLEC.” TWCIS’ Motion Exhibit 4.

On December 14, 2005, counsel for TWCIS provided written confirmation to the Commission that TWCIS had not withdrawn or deleted the retail portion of its S.C. Tariff No. 1 Applicable to Packaged Local and Interexchange IP Voice Services filed June 4, 2004. TWCIS’ Motion Exhibit 5. The notice also confirmed that TWCIS intends to continue to offer its Digital Phone service in South Carolina on a regulated basis through its S.C. Tariff No. 1 currently on file. TWCIS operates pursuant to that tariff today.

On December 28, 2005, TWCIS filed complaints against the ILECs pursuant to 47 U.S.C. Sections 251 and 252, and 26 S.C. Regs. Section 103-835 based on the ILECs’ refusal to negotiate with TWCIS for interconnection in their service areas. On March 3, 2006, the Commission consolidated the five complaint dockets for hearing purposes in *Order No. 2006-149*. The ILECs answered the complaints and filed a joint motion to dismiss or, in the alternative, hold proceedings in abeyance. In the ILECs’ joint motion, they argued that the

complaints should be dismissed because ILECs are not obligated to negotiate with TWCIS because they are exempt from such obligations under 47 U.S.C. Section 251(f).¹ In the alternative, the ILECs contended that the proceedings should be held in abeyance pending review and resolution of the IP-enabled services docket and TWCIS' Petitions for Preemption and Declaratory Ruling pending before the Federal Communications Commission ("FCC").

On May 24, 2006, TWCIS filed its motion for summary disposition and requested an opportunity for the parties to present oral arguments regarding the motions. A hearing on the oral arguments was held on June 28, 2006, in the Commission's Hearing Room. The Honorable Randy Mitchell, Chairman presided. TWCIS was represented by Frank R. Ellerbe, III, Esquire and Bonnie D. Shealy, Esquire. M. John Bowen, Esquire and Margaret Fox, Esquire represented the ILECs. Nanette S. Edwards, Staff Attorney and Jeffrey M. Nelson, Staff Attorney represented the Office of Regulatory Staff.

During the hearing, the ILECs argued that the Commission should hold the matter in abeyance pending the FCC's decision in the IP-enabled services docket and TWCIS' petitions. If the Commission moves forward on the complaints, the ILECs argued that the Commission should schedule a full evidentiary hearing to determine whether TWCIS is a "telecommunications carrier."

TWCIS responded during the hearing that the Commission has already ruled that TWCIS has the ability to enter into negotiations for interconnection as a "telecommunications carrier" in *Order No. 2005-412*. In addition, the ILECs treated TWCIS as a telecommunications carrier and agreed to negotiate as evidenced by the letter from the ILECs' counsel to Mr. Ellerbe. TWCIS'

¹ The ILECs failed to address this argument during the hearing. Since they abandoned this position, we do not address it in this Order.

Motion Exhibit 2. TWCIS stated that it is already offering service in BellSouth and Verizon's service areas and moving forward with negotiations with ALLTEL, Horry Telephone Cooperative² and Hargray Telephone Company. TWCIS is paying into both the federal and state universal funds and complying with intercarrier compensation regimes. TWCIS notes that it has complied with its obligations as a carrier and is simply requesting that the Commission require the ILECs to negotiate as indicated in Commission *Order No. 2005-412*. In addition, TWCIS states that its summary judgment request is not implicated by the pending FCC proceedings. If the FCC makes a ruling which renders an agreement void, then it should be dealt with at the time the law changes. Thus, the Commission may act on TWCIS' motion notwithstanding the request for stay made by the ILECs.

DISCUSSION

Standard of Review

Summary judgment is appropriate in this case when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *City of Columbia v. American Civil Liberties Union*, 323 S.C. 384, 475 S.E.2d 747 (Sup. Ct. 1996). Based on the pleadings and documents submitted and the arguments presented by the parties, the facts in this proceeding are not in dispute. The limited issue of whether TWCIS is entitled to negotiate with the ILECs consistent with the Commission's prior ruling and the Telecommunications Act of 1996 may be decided as a matter of law. *Spencer v. Miller*, 259 S.C. 453, 192 S.E.2d 863, 864 (1972). The Supreme Court has indicated that when a dispute is not over the underlying facts "but as to the

² An interconnection agreement between Horry Telephone Cooperative and TWCIS was filed on July 17, 2006, by counsel for the ILECs for Commission approval pursuant to 47 U.S.C. § 252(e).

interpretation of the law, and the development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues” without an evidentiary hearing. *Unisys Corp. v. S.C. Budget & Control Board*, 346 S.C. 158, 551, S.E.2d 263, 267 (Sup. Ct. 2001). Further, the FCC has expressly stated that the Commission has the authority to address issues related to whether parties are negotiating agreements in good faith. Specifically, the FCC determined that “state commissions have authority, under section 252(b)(5), to consider allegations that a party has failed to negotiate in good faith.” 47 U.S.C. § 252(b)(5); *Implementation of the Local Competition Provisions in the Telecommunications Act 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 143 (1996) (“*Local Competition Order*”) (intervening history omitted); *aff’d by AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

Compliance with Commission Orders

We agree with TWCIS that as a matter of law, the ILECs are required to comply with the orders of this Commission finding that TWCIS “possesses [the] ability as a telecommunications carrier . . . to enter into negotiations with the RLECs.” *Order No. 2005-412*, p. 6, ¶ 1. In addition, the ILECs are obligated to comply with the duty to interconnect imposed by Section 251(a) of the Federal Act as well as the obligations to provide resale, number portability, dialing parity, access to rights of way, and arrangements for the transport and termination of traffic under Section 251(b) of the Federal Act. 47 U.S.C. §§ 251(a), (b)(2), (b)(5).

To the extent that the ILECs are relying on the unsettled regulatory status of VoIP to argue that they do not have an obligation to interconnect with TWCIS, the ILECs’ position is at odds with the explicit orders of this Commission finding that TWCIS possesses interconnection rights under Section 251. The Commission granted TWCIS a certificate of public convenience

and necessity to provide competitive, facilities-based intrastate local and interexchange voice *telecommunications services* within the state of South Carolina subject to the stipulation with the South Carolina Telephone Coalition in *Order No. 2004-213*, p. 17, ¶ 1.

We agree with TWCIS that the law of this case has not changed. We have already ruled that TWCIS possesses the ability under Section 251 of the Telecommunications Act to enter into negotiations with the ILECs. *Order No. 2005-412*, p. 6, ¶ 1. Section 251(a)'s interconnection obligations apply to all telecommunications carriers without exception. There is always the possibility that the law may change in the future. At the present, we are required to apply the law as it currently stands. The FCC has determined that telecommunications carriers may interconnect under Section 251(a) or Section 251(c)(2). *Local Competition Order* ¶ 995. See also 47 C.F.R. § 51.100.

TWCIS asserted that it intends to use its own facilities; and therefore, seeks interconnection with the ILECs under Section 251(a). TWCIS' right to interconnect under Section 251(a) is established by TWCIS' status as a "telecommunications carrier" providing "telecommunications services." As explained herein, this Commission has found that TWCIS is "a telecommunications carrier under Section 251 of the Telecommunications Act of 1996." *Order No. 2005-412*, p.6, ¶ 1.

The Commission confirmed this ruling in TWCIS' application to expand its service area to include the service area of Alltel South Carolina, Inc. in *Order No. 2005-385*, Docket No. 2004-279-C, on July 20, 2005, long after the release of the FCC's *Vonage Order*. *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004). In the *ALLTEL Order*, the Commission confirmed that TWCIS was authorized to offer interexchange services and *local*

telecommunications services noting that TWCIS currently provides facilities-based IP voice service to customers and intends to begin offering services in the ALLTEL service area once it obtains an interconnection agreement. *Order No. 2005-385*, p. 2, 4.

The Commission also reaffirmed that TWCIS is qualified to provide expanded local service to the ALLTEL service area and that TWCIS continues to meet all statutory requirements for the provision of service as a CLEC. *Order No. 2005-385*, p. 5. TWCIS' expanded authority was granted based on testimony describing TWCIS' provision of services as a telecommunications carrier, using the same services and technology currently on file in TWCIS' S.C. Tariff No. 1. *Order No. 2004-279-C*, p. 2. TWCIS has publicly confirmed that it has not withdrawn or deleted the retail portion of its tariff applicable to VoIP services, and intends to continue to offer those services as regulated telecommunications services in the state of South Carolina. In fact, TWCIS provides its VoIP services as regulated, tariffed services in South Carolina today.

Res Judicata

We find that the ILECs are barred from raising the issue of whether TWCIS is a "telecommunications carrier" by the doctrine of res judicata. Res judicata applies where there is identity of parties, identity of subject matter, and an adjudication of the issue in the former suit. A litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Hilton Head Center of S.C., Inc. v. Public Service Com'n*, 294 S.C. 9, 362 S.E.2d 176, 177 (Sup. Ct. 1987).

The ILECs participated in TWCIS' initial certification hearing in 2004 as members of the South Carolina Telephone Coalition. During the hearing, TWCIS described the service it intended to offer if certificated by the Commission. The appropriate time to raise the issue of

whether TWCIS is a “telecommunications carrier” would have been during its certification docket as a “telecommunications carrier.”

In the initial certification docket, the Commission made the finding of fact that “TWCIS is a provider of local exchange and interexchange *telecommunications services* and wishes to provide its services in South Carolina.” Order No. 2004-213, p. 9, ¶ 2. The ILECs did not appeal the issue of whether TWCIS is a “telecommunications carrier” by filing a petition for rehearing or reconsideration with the Commission. TWCIS has been treated by this Commission as a “telecommunications carrier” and is currently operating in this State as a “telecommunications carrier.” By failing to raise this issue on appeal, we hold that they are barred from later attacking the finding under the doctrine of res judicata.

CONCLUSION

We disagree with the ILECs’ argument that an evidentiary hearing is necessary to determine whether TWCIS is a “telecommunications carrier.” To hold otherwise, would be inconsistent with our prior rulings. Should the FCC rule otherwise, the impact of the change in law would be considered at the time there is a change in the law. Therefore, we find as a matter of law the ILECs are required to negotiate with TWCIS pursuant to the federal Telecommunications Act of 1996 and in accordance with *Order No. 2005-412*.

IT IS THEREFORE ORDERED THAT:

1. TWCIS’ motion for summary disposition is granted.
2. The ILECs’ joint motion to dismiss or, in the alternative, hold proceedings in abeyance is denied.
3. The Commission orders the ILECs to negotiate in good faith with TWCIS.

4. If TWCIS and the ILECs have failed to negotiate interconnection agreements by _____, any party may file a petition for arbitration pursuant to Section 252(b) of the Telecommunications Act of 1934.

5. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

G. O'Neal Hamilton, Chairman

ATTEST:

C. Robert Moseley, Vice-Chairman

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CERTIFICATE OF SERVICE

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vs.

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 Defendant/Respondent.

This is to certify that I, Bonnie D. Shealy, an attorney with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below the **Time Warner Cable Information Services (South Carolina), LLC's Proposed Order Granting Motion for Summary Disposition** in the foregoing matter by email and by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

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Dated at Columbia, South Carolina this 7th day of August, 2006.

/s Bonnie D. Shealy

Bonnie D. Shealy